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Americans for Less Secrecy, More Democracy

Remarks of Patrice McDermott
before the
Public Interest Declassification Board
March 17, 2008

Thank you for the opportunity to address the Board. I want to commend you on a substantive report that raises a number of serious concerns with our system and process of declassification. The report has elevated these issues, as evidenced by the fact that the President has solicited response from the agencies. I also want to commend you for seeking comment from the public interest community, especially during Sunshine Week.

OpenTheGovernment.org is an unprecedented coalition of more than 70 organizations that work on issues of government openness and secrecy. Our members include the Federation of American Scientists, the National Security Archive, the Liberty Coalition, and OMB Watch. We are united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. These are all concerns that the Board shares with us.

Although this Report covers a wide range of concerns, I would like to focus my remarks today in just a few areas. This is not intended to indicate, of course, that I think of the significant programmatic ideas presented in the Report as outside the realm of OpenTheGovernment.org's interest and concern.

My primary area of focus will be on the issues of electronic records and their management, a point you raise in your discussion of "What the Declassification System Must Look Like Tomorrow." As you note, for declassification purposes – and, indeed, others – the government will "increasingly focus on the review of classified information contained in electronic records, such as e-mails and PowerPoint presentations, which are stored in a variety of databases and in various electronic formats." I am pleased to hear that this will be a focus for the Board over the next year.

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There is a government-wide failure to do electronic records management in general, e-mail in particular. This failure will as you note, have serious reverberations in the declassification of government information. More seriously, though, many of us in the public interest community fear that records, including historically significant records, are being lost or destroyed. This problem is most visible currently with e-mail records. As I am sure you are aware, there are reports that as many as 400 days of White House e-mails have been, at best, poorly stored and not indexed. Moreover, many White House staff used non-governmental accounts to transact government business; these records probably are lost because the non-government accounts did not save them in a record-keeping system and have indicated they do not intend to search for them. Some of this is likely a violation of the Federal Records Act, some may violate the Presidential Records Act. Part of what we do not know is how the White House handles e-mails that deal with classified information. How are they managed? We know that the White House dismantled one electronic record-keeping system, but has not to date implemented another. This is a pattern that is, unfortunately, found across the government – except that most agencies do not have any electronic record-keeping system.

On a somewhat related issue, as someone who once worked at the Carter Presidential Papers Project while it was on its way to becoming a presidential library, I find your recommendation, under Issue 3, about centralizing all classified presidential records a little surprising. My immediate concern here is about the logistics. My memory is that NARA backs up semis to the White House at dawn on the 20th of January and loads the materials up. How would the classified records, other than those from the NSC, be identified and segregated? How would the electronic records be sorted out in this rushed transition? How would their provenance be preserved? While I understand the Board's interest in efficiency in the review and declassification of presidential records, I think that your recommendations 3-5 in this section are the most feasible for at least the foreseeable future – and until the White House has an effective and reliable electronic records management system and practice.

Your concern with electronic records in also reflected in the Report's Issue Number 7: *Performing Declassification Reviews Involving Special Media and Electronic Records*. As the Report notes, the Executive Order allowed agencies to delay the required automatic declassification at 25 years for any classified information contained in special media, for instance "microforms, motion pictures, audiotapes, videotapes, or comparable media that make a review for possible declassification exemption more difficult or costly." The Report further notes that ISOO has advocated treating electronic records as special media if they involve software or hardware obsolescence, data degradation, or other similar issue that would make declassification more difficult or costly. As the Board notes, some of the special media records in which classified information was stored 25 years ago (or more) are no longer in use in the departments and agencies.

This recommendation (to treat electronic records as special media if they involve software or hardware obsolescence) is of great concern because it focuses on the *format* in which the records are stored. The Board suggests that, as part of an overall strategic

plan, NARA and the agencies need to determine which special *media* constitute "permanently valuable" records.

The recommendation that I would make here is that the Board needs to think like records managers and take into account that it is not the format that needs to be considered but, rather, the *content*. As you note, little thought seems to have been accorded in the past to even the *identification*, much less the declassification review, of significant records and information in electronic and these other media. The approach taken in the Order, while understandable in terms of resources, makes no sense in terms of making decisions about the information contained in these special formats. It is indeed possible, working with NARA and the agencies, to identify the record series that are likely to contain "permanently valuable" and even "historically significant" materials, but the records themselves will still have to be viewed and reviewed. Again, it is the information that should be the consideration; the media, in and of themselves, do not constitute "permanently valuable" records. The goal should not be to create records series based on format, but, rather, based on the office, etc., where the records were created. Thus, for instance, NARA and the agencies should identify and schedule records created by persons with original classification authority and those likely to be engaged in derivative classification, regardless of the media on which these records and the information contained in them are stored.

Delaying declassification of these records for an unspecified length of time is not the appropriate response. This is especially the case when you consider, as the Board does, that more and more of the government's records are being created and stored electronically. As the Board notes, many of these records, including special media records, also used formats proprietary to the agency that created them. Thus, even if the information in the special media record could be viewed, it might not be readily transferable to other kinds of systems or formats, such as digital formats. I agree that this a great concern, and not only for classified records. I would bring to the Board's attention that is much more likely that the formats are not, indeed, proprietary to the *agency*, but – more likely – to a vendor (such as Microsoft). Transfer to a neutral digital format will be necessary, as you note, "in order to review it for declassification and to make it available to the public." But little thought has been given to this issue before now, and public access to the information in these records is delayed. Additionally, while the Electronic Records Archives is meant to overcome – over time – the problems of software and hardware obsolescence, the issue of data degradation is an ongoing matter of real concern that the ERA will inherit, not solve.

All these concerns would seem to argue for the development of a plan to deal with materials in these formats sooner rather than at an unspecified future date. The Board is well aware that records do not come to the Archives contemporaneously, but may well molder in agency files for most of those 25 or more years. What will occur with these records after declassification reviews have taken place, and the records will need to be transferred electronically to the National Archives is also of concern. Most of our hopes and assumptions about the archival processing and ultimately electronic public availability to the public hinge on the development on the Electronic Record Archives.

As your report notes, however, "it is unclear to the Board ... whether the needs of the declassification system could be folded into, and would be assimilated by, the ERA initiative that is now under way." Again, these concerns argue for more – not less – urgent attention to these records.

In this regard, I agree that a critical function that a National Declassification Center could serve would be to put "uniform policies in place to ensure that activities of departments and agencies are synchronized and standardized with what NARA itself is planning in terms of the Electronic Records Archive; that is, digitizing its archival records and making them available to the public electronically."

One further thought on the issue of electronic records: the process of "Re-Review of Previously Declassified Information" would seem to be made more fraught when those records exist solely in electronic format. The removal of records from the open shelves at the National Archives, discovered in 2006, might have been more permanent had these not been paper records. The process of public access to records needs to be thought through carefully by this Board and NARA to ensure that "pulling" an electronic record does not permit it to be permanently removed from the Archives' holdings. A clear and public process needs to be put into place regarding how 'removed' e-documents will be protected and preserved. Your recommendation that the withdrawal of previously available records require the approval of the Archivist and that this be codified in Executive Order is important in this regard, and should include controls on the ability of agencies to withdraw the electronic record in toto.

In this area, I applaud your recommendation that, in considering removal actions, agencies make "a convincing assessment of 'significant harm.'" This assessment should be concurred in by the Archivist before he or she approves the removal of any record from public access.

The second area on which I am focusing my remarks today concerns the Board's discussion of "Other Exempted Information" or what the rest of us call Sensitive But Unclassified. As the Report notes, these types of markings have more recently been designated "Controlled Unclassified Information," specifically by the Information Sharing Environment Program Office at ODNI. This term serves as an umbrella for a host of "agency-unique caveats to be applied during an FOIA review." The ISE Program Office does not consider any of these marking as creating an exemption from FOIA, but that has not stopped the agencies from treating them as creating a mandatory exemption. Further, as you note, the FOIA does not say how long agencies may withhold information in these exempted categories, no executive branch policy sets a limit, and there is no requirement to review this information at a certain point to determine whether (like classified information) it can be released to the public.

More stunningly, we were told by the ISE Program Office when we were putting together our Secrecy Report Card last year that they had at that time reviewed 107 SBU markings and found about 81% were "policy, "i.e., based on Department and agency policies (in other words, made up by the agencies as they go along); only the remainder of the

markings (approximately 19%) derive their authority from formally promulgated regulations, about half with comment and half without.

This is a key problem with these markings. They are made up and treated by the agencies, as well as those of us on the outside can tell, like Vice-President Cheney's self-minted marking of "Treat As Classified." That is, the information so-marked is put off-limits to the public, essentially without limit and without justification. As you put it, agencies are basically left to their own devices. Apart from the statutory requirement to turn over their permanently valuable records (including records containing designated material) to NARA for archival processing, no law or executive branch policy governs the disposition of such records.

The key point, however, is that the records marked with these designations are not classified. I am, therefore, troubled by treatment of these markings in the Report and recommendations as though they were super-classified, rather than not classified – or perhaps even classifiable. The public has not had access to the report and recommendations of Ambassador McNamara, but we know the general concerns about the abuse of these markings. Much of the information so marked is likely releasable much sooner than 25 years. As the public is not made aware of the existence of such documents and has been generally rebuffed when requesting CUI under the FOIA, however, there is no other process for forcing the removal of protection and public release. The recommendation for Uniform Standards is important and is, we hope, part of the recommendations to the President made by the ISE. I think, however, that linking decontrol and release of CUI-marked documents to the declassification process gives these markings a permanence – or at least a duration – that they should not be accorded without careful review.

The review and archival backlogs of information concealed by these markings are more properly dealt with by establishing clear processes for review and enforceable deadlines for release. Many of us in the public interest community have argued that these markings should have a sunset, with possibilities for renewal. Renewal should not be automatic. Indeed, agencies should be required to make "a convincing assessment of "significant harm" in order to assign these markings in the first place and to maintain them past a short sunset date.

In light of concerns with backlogs created by records designated CUI, I want to express the concern of the public interest community that much of our current – and future – problems with declassification are the result of unnecessary classification and massive over-classification of information across the government. This has been a concern of ISOO's, we know, and I would hope the Board devotes some time to this problem as it stands to completely overwhelm whatever improved processes for identifying historically significant information or enhanced declassification system may be created.

Finally, although there are many issues and recommendations that are significant and important in the Report, I want to support your recommendations on declassification

review of classified records created by committees of Congress, both the House and the Senate.

As I said at the beginning of my remarks, this is a very important report and it contains many strong recommendations. As you develop a plan for making these recommendations happen, we would like to be engaged with the Board as it works to absorb the responses from the agencies and to prioritize these recommendations, as this is an expansive agenda. When opportunities arise, we will seek to reinforce your message on the Hill, with our members and with the press.

In the vein of moving this agenda, the Board can and should be doing direct outreach on the Hill – to the Intelligence and Homeland Security Committees, to committees that have oversight of government operations such as Rep. Waxman's? It is essential that these committees hear your explanation of the insights contained in this report – especially when new programs and entities are being recommended. As I am sure you are aware, support for these recommendations will have to be built and that is usually a slow process.

I also urge the Board to make these views on this critical topic known beyond the halls of government and the Hill. I suggest that you digest the opening portions of this report down and submit it as an op-ed to the Post or the New York Times. This important message from an august group such as this merits a wider hearing and broad discussion.

Thank you, again, for this opportunity.